IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1974

NO. 74-1023

Supreme Court, U. S.
FILED
AUG 1 1975
MICHAEL RODAK, JR., CLERK

HENRY W. KERR, et al., Petitioners,

vs.

UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, Respondent,

JOHN VAN GELDERN, et al., Real Parties In Interest.

MEMORANDUM OF RESPONDENTS CONCERNING MOOTNESS OF PENDING MATTER

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MEMORANDUM OF RESPONDENTS CONCERNING

MOOTNESS OF PENDING MATTER

INTRODUCTION

The plaintiffs-respondents[1/] in the above-entitled case file this memorandum to advise the Court of certain facts which, in respondents' view, render this cause moot. Respondents no longer seek any of the documents which are the subject of this appeal, because the trial of this case in District Court will

1/ As herein used, "respondents" refers only to those respondents who are also real parties in interest.

be completed before this Court is able to decide issues before it, all of which concern access to documents which were to be used only for trial purposes.

SUMMARY OF THE CONTROVERSY

Defendants-petitioners in this appeal seek the reversal of two orders of the District Court for the Northern District of California which would have allowed respondents access to the central files of certain inmates of the California Department of Corrections, to the personnel files of members and certain employees of the state parole board and the Department of Corrections, and to certain other documents. These orders were issued pursuant to Rule 34 of the Federal Rules of Civil Procedure. The Court of Appeals for the Ninth Circuit refused to reverse these orders and petitioners sought a review from this Court. In their petition for writ of certiorari, petitioners raised questions concerning the power of a District Court to require an

agency of the state to produce documents when the agency says they are privileged but fails to lodge a formal claim. The petition was granted May 27, 1975.

NEW FACTS WHICH RENDER THE CASE MOOT

The following has occurred since the petition was filed in this Court. In respondents' view, they render this case moot:

On June 25, 1975, petitioners' motion for indefinite postponement of trial was denied by the District Court; and the case was set for trial on September 8, 1975. Respondents have moved for one further extension until October 15, 1975. Trial is unlikely to last longer than six weeks, and will have concconcluded long before this Court can determine the issues presently before it on certiorari. Those issues, however, are limited to respondents' Rule 34 request for the production of documents to be used at trial and the District Court's orders that they be produced solely for that purpose.

In view of the stays of those orders entered by this Court and by the Ninth Circuit, respondents have been forced to decide to either (1) go to trial without those documents or (2) postpone the trial for an entire year, while the case presently pending in this Court is argued in late Fall, the opinion announced, and the mandate issued (probably after the further disposition of a petition for rehearing). If the decision is adverse to respondents, they may well have to go to trial without these documents anyway; if favorable to respondents, a period of several additional months would obviously be required (1) for petitioners to assemble and produce the documents (and probably, under the Ninth Circuit's opinion here under review, seek some in camera inspection) and (2) for respondents then to inspect and organize the documents for use at trial.

Although these documents remain crucial to respondents' case, the consequences of post-

poning the trial for an entire year are so adverse that respondents have reluctantly decided to go to trial without them. These consequences include, but are not limited to, the fact that as time goes by (1) the substantial evidence which respondents have assembled becomes stale; (2) prospective witnesses become unavailable and must be replaced; (3) new members and hearing representatives will be appointed to the Adult Authority (some of whom must be added as defendants) and must be deposed; (4) changes to the parole-granting system, which are being made by defendants will likely require respondents to amend their complaint and probably engage in further discovery; (5) petitioners will continue to utilize new developments (as they are presently doing in the District Court) to seek further delays in the trial date; and (6) prison release dates of inmates may be delayed along with the trial. These and other problems are

exacerbated by the fact that respondents are primarily represented by foundation-supported public interest legal services organizations, which are prosecuting this case on a limited budget and which cannot afford either to prolong this litigation for an additional year or to pursue in this Court a question not dealing with the merits or trial or their underlying claims. Thus respondents have had to resolve the conflict by choosing to go to trial with the other evidence they have accumulated, even at the risk of failing to prove their case due to the absence of the crucial documents sought pursuant to Rule 34.

Since the trial in the District Court will have concluded long before this Court will have determined the case presently pending before it and since the case in this Court involves only the discovery of documents for use at that trial, the case at bench is now moot.

This Court has pointed out many times that

it has power to act only in the context of a justiciable case or controversy and thus lacks jurisdiction to review moot cases. See, for example, S.E.C. v. Medical Committee for Human Rights, 404 U.S. 403, 407, 92 S. Ct. 577, 579, 30 L.Ed.2d 560 (1972); Benton v. Maryland, 395 U.S. 784, 788, 89 S.Ct. 2056, 2059, 23 L.Ed.2d 707 (1969); and Liner v. Jafco, Inc., 375 U.S. 301, 306 n.3, 84 S.Ct. 391, 394, 11 L.Ed.2d 347 (1964). As recently as June of this year, this Court, quoting with approval from North Carolina v. Rice, 404 U.S. 244, 246 (1971), stated that federal courts do not have power "to decide questions that cannot affect the rights of litigants in the case before them." Preiser v. Newkirk, ___U.S. ___, 95 S.Ct. 2330, 2334, ___ L.Ed.2d ____, 43 U.S.L.W. 4877, 4879 (1975). Clearly, a decision by this Court in the case now before it will have no effect on the rights of the litigants, since the trial will be completed long before any decision by this Court.

This Court has made an exception to this rule to cover cases which, by their very nature, would always be terminated before the underlying rights could be heard on appeal. As Moore has written, "[i]n such cases a strict adherence to the requirements of a present controversy would leave plaintiff always suspended between prematurity and mootness." 6A J. Moore, Federal Practice, 57.13 (2d ed., 1974). This Court has applied this exception in Roe v. Wade, 401 U.S. 113, 93 S.Ct. 705, 35 L.Ed. 2d 147 (1973), which challenged the constitutionality of an anti-abortion statute, and to a number of cases which attacked election rules and procedures, including Moore v. Ogilvie, 394 U.S. 814, 89 S.Ct. 1493, 23 L.Ed. 2d 1 (1969); Dunn v. Blumstein, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed. 2d 274 (1972); Rosario v. Rockerfeller, 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed. 2d 1 (1973). This exception does not apply in the present appeal. The issues raised in this

appeal are not of the type which, by their very nature, would never be definitively settled on appeal. Quite the contrary, in most such cases plaintiffs-respondents would customarily need and await an appellate opinion before proceeding. The questions before this Court are mooted only because it does not pay for respondents to pursue this claim to the disputed documents under circumstances where the trial will, as a practical matter, be completed before this Court is able to decide the questions. In addition, it is the plaintiffs-respondents--the party disadvantaged by the Court's not hearing this appeal--who no longer seek the documents (because, among other reasons, the resulting delay may mean additional prison time for them).

URGENCY

Respondents respectfully call the attention of the Court to the fact that the brief on the merits has not yet been filed by respondents. Therefore a prompt decision by this Court on the mootness

of the issues on which certiorari has been granted would save both parties and the Court considerable time and expense.

CONCLUSION

If the Court now decides the questions raised in the petition in this case, it will be passing only on abstract questions of law which will have no effect on the underlying controversy.

For these reasons, respondents respectfully submit that issues raised are moot and that the order of this Court granting certiorari should be vacated and the cause remanded to the Court of Appeals for the Ninth Circuit with directions to dismiss as moot.

Dated: July 29, 1975

Respectfully submitted,

SIDNEY M. WOLINSKY
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Attorneys for
Plaintiffs-Respondents

By Sidney M. Wolinsky
SIDNEY M. WOLINSKY

IN THE

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CERTIFICATE OF SERVICE

I, SIDNEY M. WOLINSKY, attorney for respondents herein, hereby certify that, on the 31st day of July, 1975, I caused copies of this Memorandum of Respondents Concerning Mootness of Pending Matter to be served on all the parties required to be served by mailing three (3) copies in a duly addressed envelope to KARL S. MAYER, Deputy Attorney General of the State of California and attorney for petitioners herein, 6000 State Building, San Francisco, California 94102.

DATED: July 31, 1975

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